Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

October Term, 1996

PARKER M. NIELSON

*Petitioner,*

*vs.*

SYRETT CORPORATION,

*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## QUESTIONS PRESENTED

I. Whether sanctions may be determined without entering the order prescribed by Rule 11(c) (3), Federal Rules of Civil Procedure, describing the conduct sanctioned?

II. Whether procedural and due process requirements of Rule 11, including the "safe harbor" election and service on the parties, are discretionary and may be ignored?

III. Whether the District Court has jurisdiction to entertain a motion for Rule 11 sanctions filed after the case was concluded and time for filing collateral proceedings expired, against an attorney who had withdrawn upwards of a year earlier?

## LIST OF PARTIES

The parties to the proceedings in the court whose judgement is sought to be reviewed were Automobile Assurance Financial Corporation and Frank P. Venut, Plaintiffs and Counterclaim Defendants; Syrett Corporation, doing business as Ruby's Inn, Defendant, Counter claimant and Third Party Plaintiff; and John R. Riley, Third Party Defendant. Petitioner was not a party, but formerly appeared as counsel for Plaintiffs and Counterclaim Defendants. There is no other parent or subsidiary company of any party to be listed.

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*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Parker M. Nielson, Respondent-Appellant in the courts below, prays that a writ of certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The Memorandum Decision of the United States District Court for the District of Utah determining violations of Rule 11, Federal Rules of

Civil Procedure, is unreported. (See App.B, A-7 to A-11.) The Order of said court denying entry of an order conforming to Rule 11(c)(3) is unreported. (See App. C, A-12 to A-19.) The Order and Judgment of the United States Court of Appeals for the Tenth Circuit is reported at 107 F.3d 20 (10th Cir. 1997). (See App. A, A-1 to A-5.)

## JURISDICTION

The Order and Judgment of the Court of Appeals was filed on February 7, 1997. Timely Petition for Rehearing was filed on February 21, 1997 and denied March 11, 1997. The time for filing this petition expires June 9, 1997. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

## RULES INVOLVED

Rules 11(c)(1) and (3), and 58, Federal Rules of Civil Procedure (1993), provide:

> (c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
>
> (1) *How Initiated.*
>
> (A) *By Motion.* A motion for sanctions under this ruleshall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

* * * * *

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

Rule 58:

...upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgement is effective only when so set forth and when entered as provided in Rule 79 (a)...

## STATEMENT OF THE CASE

Petitioner, Parker M. Nielson ("Petitioner" or "Nielson" herein), is an active, practicing member of the bar of this Court.[1] Nielson appeared as counsel for the plaintiff in proceedings before the United States District Court for the District of Utah ("District Court" herein) alleging violations of, *inter alia*, Section 12 of the Securities Act of 1933 (15 U.S.C. § 77*l*) in connection with an acknowledged agreement to conduct an offering of securities. The dispute was confined to whether stock issued to the underwriter as consideration must be returned when the issuer abandoned the offering.

Nielson withdrew as counsel pursuant to motion filed on September 9, 1993, and approved by an order of the District Court dated September 15, 1993. Nine (9) months later, judgment was entered in favor of defendants on June 15, 1994. Thereafter, on July 29, 1994, after final judgment had been entered, the case concluded and appeal time had expired, defendants purported to file a motion under Rule 11, Federal Rules of Civil Procedure, ("Rule 11" or "the Rule" herein) accusing Nielson of abusive litigation practices incident to the filing of the Complaint four

1. E.g., Affiliated Ute Citizens v. United States, 406 U.S. 128 (1927).

(4) years earlier, on March 27, 1990. The motion was not served on Nielson twenty-one (21) days prior to filing with the Court, nor served on any of the parties as required by Rule 5, Federal Rules of Civil Procedure, incorporated in Rule 11 (c)(1)(A).

On October 4, 1995, the District Judge issued a Memorandum Decision (the "Mem. Decision" herein, App. B) purporting to sanction Nielson for unspecified violations of Rule 11.[2] No order was entered describing any allegation of the complaint or any other pleading for which Nielson was purportedly sanctioned.

Nielson, appearing specially, without consenting to jurisdiction, objected that there was no identification of any sanctionable conduct, nor jurisdiction over him and that he was not representing any party; that there had been no service of the motion leading up to the Mem. Decision identifying any offending conduct and therefore no compliance with the requirement of Rule 11(c)(1) that it "shall not be filed" unless served on counsel twenty one (21) days in advance; there had been no service of either the motion or the Mem. Decision on the parties as required by the Rule; that Nielson had invoked the "safe harbor" provided by the Rule; that the Mem. Decision related to claims and defenses asserted on behalf of persons never represented by Nielson and events which occurred in the state court or long after Nielson had withdrawn as counsel as to which the District Judge had no jurisdiction; and requesting that the District Judge enter an order, as required by Rule 11(c)(3), describing the conduct purportedly sanctioned.

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2. The Mem. Decision declared, in pertinent part:

A prefiling inquiry into the facts and law applicable to the Syrett Corporation litigation would have revealed serious deficiencies. . . . there were numerous opportunities throughout the course of the lawsuit where reasonable inquiry would have dictated Mr. Nielon's abandonment of unmeritorious claims and defenses due to utter lack of merit. Mr. Nielson's practice of filing spurious motions to which Syrett Corporation had to respond combined with his assertion of groundless positions in opposition to Syrett's claims caused Syrett to unnecessarily incur legal costs, impeded proper discovery, delayed the litigation, appeared improperly motivated and designed to harass.

Accordingly, based on the entire record of the case, including, but not limited to, the pleadings filed in support of the motion for sanctions, the court finds an attorney, upon reasonable inquiry into the facts and law, would have known that many of the claims, defenses, motions and arguments advanced by Mr. Nielson were not warranted by the facts, existing law or a good faith argument for the extension, modification, ore reversal of existing law. (App. B, A-7 to A-11.)

The District Court declared in a formal Order (the "Order" herein, App. C) that "the motion for entry of order conforming to Rules 11(c)(3) and 58 . . . is denied"; that jurisdiction was not required; that service on the parties pursuant to Rule 11(c)(1)(A) would not be required; that the conduct sanctioned would not be described; nor would the District Court permit Nielson to invoke the "safe harbor" provisions of Rule 11 (c)(1)(A).

The Court of Appeals acknowledged Petitioner's claim that the District Court "fail[ed] to identify the conduct sanctioned" (App. A, A-1 to A-5) and "his position that the district court did not identify any conduct that would subject him to sanctions under Rule 11" (App. A, A-1 to A-5), but affirmed without requiring identification of any such conduct. The reasoning of the Court of Appeals, in its entirety, was that:

> The district court's orders clearly stated that Mr. Nielson's clients had acted fraudulently and wrongfully in the dealings with Syrett. Mr. Nielson signed the complaint, the amended complaint, the second amended complaint, and numerous additional documents advancing his clients' claims and defenses based on their fraudulent and wrongful actions. (App A, A-1 to A-5)

No "claim or defense" was identified by either the Court of Appeals or the District Court.

## BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Petitioner denied that there was jurisdiction in the District Court. The Court of Appeals held that "a federal court may consider collateral issues after an action is no longer pending." (App. A, A-1 to A-5) The District Court cited no basis for jurisdiction other than Rule 11.

## REASONS FOR GRANTING THE WRIT

The decisions of the lower courts so far depart from the accepted and usual course of judicial proceedings, as prescribed by Rule 11, that they present serious problems of supervision of the lower federal courts, and of members of the bar of the lower courts and of this Court, which were

recurring problems under the 1983 version of Rule 11. *E.g., Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384 (1990); *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989). The Order and Judgment of the Court of Appeals sanctioned disregard of Rule 11 and thus presents a renewal of the problems the 1993 version of the Rule effected to remedy, including open, declared disregard of the Rule; and the "intolerable strain upon lawyers' ethical duty to represent their client and not assist the opposing side" predicted by Mr. Justice Scalia in his dissent to this Court's April 23, 1993 Order adopting the 1993 amendments to the Federal Rules of Civil Procedure, Mr. Justice Thomas concurring. Decisions of the lower courts also represent a revival of issues of due process which have been the concern of this Court from its inception, *e.g., Pennoyer v. Neff*, 95 U.S. 714 (1877) and extending through contemporary declarations that due process "is embodied in the very vocabulary which we use to describe judgements." *Schaffer v. Heitner*, 433 U.S. 186, 199 (1977).

Implicit in the Order and Judgment of the Court of Appeals is that the reason for and manner of imposition of sanctions is discretionary with the trial judge, in spite of Rule 11(c)'s declaration that sanctions are "subject to the conditions stated below." Further implicit is that a lawyer forfeits the right to due process by becoming a member of the bar of the federal courts. The Court of Appeals in fact held that compliance with the requirements of Rule 11, its procedural, due process and "safe harbor" provisions in particular is not required.

## I

## THE CASE PRESENTS IMPORTANT QUESTIONS CONCERNING DISCRETION OF LOWER FEDERAL COURTS TO IGNORE THE "SAFE HARBOR" PROVISION AS TO WHICH THE SECOND AND FIFTH CIRCUITS ARE IN CONFLICT

The District Court ruled that Petitioner's exercise of the "safe harbor" adopted in the 1993 amendments to Rule 11 would not be allowed. The Court of Appeals affirmed, implicitly holding that the "safe harbor" was discretionary and could be ignored.

The United States Court of Appeals for the Second Circuit reached the opposite result, reversing an order of sanctions because the movant

failed to wait the 21 days required by the safe harbor provision in *Hadges v. Yonkers Racing Corp., 48 F.3d 1320, 1328 (2d Cir. 1995)*

> In imposing sanctions, the district court apparently did not take into account YRC's failure to comply with the revised procedural requirements of Rule 11 .... there is no evidence in the record indicating that YRC served Hadges with the request for sanctions 21 days before presenting it to the court. Thus, YRC denied Hadges the "safe harbor" period that the current version of the Rule specifically mandates.

The Court of Appeals for the Fifth Circuit held the "safe harbor" mandatory. *Elliott v. Tilton,* 64 F.3d 213, 216 (5th Cir. 1995).

The denial of the safe harbor herein cannot be reconciled with the plain declaration of Rule 11(c) that imposition of sanctions is "subject to the conditions stated below" and the condition of subdivision (c)(1)(A):

> [the motion] shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

The lower courts were advised of the provision of the Rule, but the District Court refused to require service on the respondent twenty-one (21) days prior to filing. The District Court further acknowledged at (App. B, A-7 to A-11) that Nielson had invoked the "safe harbor" provision, but held that "the court finds the 'safe harbor' provisions advanced by Mr. Nielson to be inapplicable" and that they could be ignored:

> "Contrary to [Nielson's] assertions, the "safe harbor" election does not apply to Syrett's motion. Even if the court were to allow Mr. Nielson's purported "safe harbor" election to stand, his withdrawal of every comment, reference, pleading or allegation made during the course of the litigation is disingenuous and in violation

> of the letter and spirit of amended Rule 11. (App. C, A-13 to A-18)

The Court of Appeals acknowledged that "[t]he district court rejected Mr. Nielson's claim that he was entitled to the safe harbor provisions of the 1993 Rule, which require the party seeking sanctions to notify the offending party and give him or her an opportunity to correct the situation before filing a motion for sanctions." The Court of Appeals then restated the ruling of the District Court, without reasoning or analysis:

> Mr. Nielson's attempt to avoid sanctions by a general, blanket withdrawal, filed well after the damage was done, does not entitle him to the safe harbor. (App. A, A-1 to A-5)

## II

## THE DECISION HEREIN DEPARTS FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS REQUIRING FINDINGS AND AN ORDER, AND DUE PROCESS, IN CONFLICT WITH DECISIONS OF THE SECOND AND THIRD CIRCUITS

The Order and Judgement of the Court of Appeals sanctioned departure from the usual course of judicial proceedings by the District Court and disregard the plain provisions of Rule 11 requiring notice and service of process. Doing so conflicts with opinions of the Courts of Appeals for the Second and Third Circuits, as follows:

### *A. No Order Describing Conduct Sanctioned Was Issued.*

Rule 11(c)(3) is specific that the conduct sanctioned must be described in an order:

> (3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

Rather than describe the conduct sanctioned, the District Court in-

corporated by reference a Judgment "signed and entered by the court on June 15, 1994" (App. C, A-13 to A-18) and findings pursuant to which the Judgement was entered (App. C, A-13 to A-18) which were more than eight (8) months after Nielson had withdrawn, declaring that they were the basis for sanctions. The Judgment and findings made no reference to violation of Rule 11, either by the parties or by Nielson.

The Court of Appeals affirmed the decision of the District Court, holding that "the court need not issue a separate 'order' under subdivision (c) (3) [of Rule 11]":

> The remainder of Mr. Nielson's arguments are directed to his position that the district court did not identify any conduct that would subject him to sanctions under Rule 11. The district court's orders clearly stated that Mr. Nielson's clients acted fraudulently and wrongfully in their dealings with Syrett. Mr. Nielson signed the complaint, the amended complaint, the second amended complaint, and numerous additional documents advancing his clients' claims based on their fraudulent and wrongful actions." (App. A, A-1 to A-5.)

That ruling is flawed thrice over, both logically and legally:

(1) The District Court did not identify the complaint or any pleadings as being in violation of the certification requirement of the Rule.[3] To the contrary, the District Court referred to a "pattern of conduct en-

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3. The Complaint, which alleged violation of §12 of the Securities Act, 15 U.S.C. § 771, based upon breach of a contract to sell securities, could not be without bases in law, and the conclusion of the Court of Appeals that, because the District Court eventually found "that Mr. Nielson's clients had acted fraudulently and wrongfully in their dealing with Syrett," (App. C, 5) Petitioner therefore violated Rule 11 by advancing their claims, cannot be reconciled with Gustafson v. Alloyd Co, U.S. , 115 S.Ct. 1061 (1995) in which this Court divided 5-4 on the question of whether § 12 applied to a contract for the sale of securities because it was not within the documents required to be filed with the SEC under § 10 of the Securities Act. 115 S.Ct. At 1073. The minority of Justices Thomas and Ginsburg, both of whom dissented and were joined by Justices Scalia and Breyer, were of the opinion that a prospectus for the purposes of § 12 was broader than the terms under § 10 and included a contact for the sale of securities (analogous to the contact at issue herein) as well as documents used in public distribution of securities. 115 S.Ct. At 1076.

gaged in by Mr. Nielson and his client throughout the course of the litigation." (App. B, A-7 to A-11) Conflicting with the decision herein, the Court of Appeals for the Second Circuit recently held that "Rule 11 may not be employed to sanction obnoxious conduct during the course of litigation." *Lapidus, S.A. Vann,* ___ *F.3d* ___, 65 U.S.L.W. 2715, 1716 (2d Cir., decided April 25, 1997).

(2) The 1983 version of the Rule, substantive provisions of which the District Court invoked, applied only to disregard of the certification requirements, which this Court held was the "cornerstone" of Rule 11, not to abusive litigation practices. *Cooter & Gell v. Hartmax Corp.,* 496 U.S. 384 (1990).

(3) Rule 11 is specific that the conduct sanctioned must be described, by "order." There is no discretion to disregard that requirement, for Rule 11(c) is specific that sanctions are "subject to the conditions stated below."

The Court of Appeals cannot supply the finding that the District Judge declared it would not. To the extent that it purported to do so, its ruling was defective for it failed to describe any allegation that was incorrect or not supported by law in any of the documents referred to.

Even fraudulent parties are entitled to counsel, we submit. That is implicit and essential to an adversary system. It is not only possible, but *expected* that *truthful* allegations will be made in support of the claims of fraudulent parties — even those who are guilty of crimes. The requirement of the Rule is not merely that there be some pleading or document signed by counsel, for that will be true in every case. The requirement, rather, plainly stated in the Rule, is that the pleading or other paper contain allegations not supported by fact, by reasonable investigating, or not supported by law or a reasonable argument for extension of existing law. If advocating their position offends Rule 11, therefore, the Order and Judgment means that parties ultimately found to have acted fraudulently cannot be represented without their lawyers being placed under the intolerable ethical strain predicted by Justices Scalia and Thomas.

The Court of Appeals for the Third Circuit has held, *apropos* the Court of Appeals reference to pleadings signed by Petitioner, without

describing any way in which they offend the certification requirement, that a "scatter-gun" approach, in which the district court lists the sources of its sanctioning power, but does not explain the ways the lawyer violated each one, deprives the lawyer of due process. *Martin v. Brown,* 63 F.3d 1252, 1262-1263 (3d Cir. 1995).

> With regard sanctions, particularized notice of the grounds for the sanction under consideration is generally required.
>
> * * * *
>
> .... the district court should first enter an order describing the specific conduct that it believes will warrant sanctions and direct the person it seeks to sanction to show cause why particular sanctions should not be imposed. See Rule 11 (c)(1)(B); *see also* Rule 11 (c)(3) ("When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.") .... and describe the specific conduct that supports the particular Rule 11 sanction imposed. (Citing *Simmerman v. Corino,* 27 F.3d 58, 64 (3rd Cir. 1994); *Jones v. Pittsburgh National Corp.,* 899 F.2d 1350, 1357 (3rd Cir. 1990).)

The Court of Appeals for the Second Circuit also concluded, contrary to the Court of Appeals herein, that "[i]f a court wishes to exercise its discretion to impose sanctions sua sponte, it must 'enter an order describing the specific conduct that appears to violate subdivision (b) ...." *Hadges v. Yonkers Racing Corp.,* 48 F.3d 1320, 1328 (2d Cir. 1995).

The Court of Appeals herein did what the Courts of Appeals for the Second and Third Circuit held[4] was improper, precisely. The proper course

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4 Other circuits have held, albeit under the 1983 version of the Rule, that reviewable findings are required. E.g., Cunningham v. Waters Tan & Co., 65 F.3d 1351, 1361 (7th Cir. 1995); FDIC V. Calhoun, 34 F.3d 1291 (5th Cir. 1994); Bodenhamer Bldg. Corp. v. Architectural Research Corp. 989 f.2d 213 (Th Cir. 1993); Jones v. Pittsburgh National Corp. 899 F.2d 1350, 1357 (3rd Cir. 1990); Karager v. Solomon & Flanagan, 775 F.2d 1541 (11th Cir. 1985)

of judicial proceedings under Rule 11 is as defined by the Court in *Cooter & Gell, supra.*, and followed by the Second and Third Circuits in *Martin v. Brown, supra.*, and *Hadges v. Yonkers, supra.*,. The prospect, if the decisions of the lower courts are not corrected, is departure from the accepted and usual course of judicial proceedings prescribe by Rule 11, which requires an order describing sanctioned conduct, and loss of the deterrent effect of Rule 11 intended by the majority of this Court, for there will be no order describing conduct sanctioned and no possibility that the respondent attorney and other members of the bar will be informed of the conduct they are to refrain from.

B. *Due Process Under Rule 11 Was Denied.*

The obvious purpose of the reforms to Rule 11 (c)(1)(A) adopted by this Court in 1993 was to codify and define due process requirements:

> A motion for sanctions under this rule shall be made separately from other motions or requests and . . . shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the [safe harbor is not invoked].

The District Court cited the foregoing provision at (App. B, A-7 to A-11) but declared that it would not require service on the parties according to Rule 5, Federal Rules of Civil Procedure. The Court of Appeals never addressed the failure to conform to Rule 5 or to require service twenty one (21) days prior to filing.

*Lapidus, S.A. v. Vann*, ___ F.3d ___, 65 U.S.L.W. 2715, 1716 (2d Cir., decided April 25, 1997) held that "[d]ue process requires that courts provide notice and an opportunity to be heard before imposing any kind of sanctions." (Citation omitted.) *Martin v. Brown*, 63 F.3d 1252, 1262 (3d Cir. 1995), reached the same conclusion, holding that "[t]he Due Process Clause of the Fifth Amendment requires a federal court to provide notice and an opportunity to be heard before sanctions are imposed on a litigant or attorney and that

> The process that is due varies with the nature of par-

> ticular disputes, and evaluation of its requirements should balance fairly the competing interests of the sanctioned persons against the judicial system's need for efficient judicial administration. *Ibid.*

There can be little doubt, we submit, that the process that is due and the course of judicial proceedings that is usual is that defined by the 1993 revision of Rule 11. Certiorari should be granted to correct the denial of due process by the Court of Appeals herein, correct departure from the usual course of judicial proceedings under Rule 11 and require uniformity among the Circuits in implementation of the provisions of Rule 11 (c)(1)(A).

C. *Failure to Require An Order Disregards Both Rules 11 and 58.*

The Court of Appeals assumed, but did not decide, at *inter alia* (App. A, A-2) that "[t]he district court issued its memorandum decision *ordering* sanctions against Mr. Nielson." (Emphasis added.) That conclusion misstates, or misapprehends that the Memorandum Decision could not be construed as an "order" because of the plain provision of both Rules 11(c)(3) and 58, Federal Rules of Civil Procedure.

Rule 11 (c)(3), entitled "order", is explicit that "*the court* shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed." (Emphasis added.) The Order (App. C, A-13 to A-18) acknowledged that "the moving papers of Syrett Corporation" were "adopt[ed]" as the Court's reasons. The District Judge may not delegate the determination of sanctionable conduct to opposing counsel, whatever his level of confidence in them. Rule 58, Federal Rules of Civil Procedure, provides that "the court shall promptly approve the form of the judgement, and the clerk shall thereupon enter it . . . A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."

The District Court declared, in a written order dated January 11, 1996, that "the motion for entry of order conforming to Rules 11(c)(3) and 58 . . . is denied." (App. C, A-13 to A-18). It therefore departed — intentionally, we submit — from the usual course of judicial proceedings prescribed by Rule 11. The Order and Judgment of the Court of Appeals

sanctioned such a departure.

The Order and Judgement of the Court of Appeals thus creates chaos in the administration of the federal rules. The conclusion of the District Court that sanctions were authorized was affirmed, but no order was required pursuant to Rule 11 (c) (3). Nothing has been docketed pursuant to Rule 58. An order of the District Court remains outstanding, affirmed by the Court of Appeals, that it will not, and is not, required to conform to either requirement. The parties, both plaintiff and defendant, will be left in a hopeless quandary and the due process requirements of Rule 11 made mockery.

## III

## THE DECISION HEREIN CONFLICTS WITH DECISIONS OF THE THIRD CIRCUIT REGARDING LACHES AND JURISDICTION

The Court of Appeals failed to implement the clear declaration of the Advisory Committee under *both* the 1983 and 1993 versions of the Rule that a motion must be filed promptly upon learning of allegedly offensive conduct. The error was compounded when the Court of Appeals held that, because a motion had not been filed until *after* the case was concluded, "Mr. Nielson's attempt to avoid sanctions by a general, blanket withdrawal, filed well after the damage was done, does not entitle him to the safe harbor." (App. A, A-1 to A-5) The Court of Appeals failed to recognize that the requirement of timely notice is necessary to afford an opportunity to exercise the safe harbor option and to take reasonable remedial action.

Both the District Court and the Court of Appeals disregarded the clear dictum of the Advisory Committee and held that a motion could be filed *after* the case had been concluded, in the absence of timely proceedings preserving jurisdiction for collateral post-judgment matters.

The Court of Appeals for the Third Circuit has reached the opposite conclusion, in cases arising under both the 1983 and 1993 versions of Rule 11. *Simmerman v. Corino,* 27 F.3d 58 62 (3rd Cir. 1994), arising under the 1993 Rule but involving violations of the 1983 version, held

that "the court abused its discretion in imposing sanctions on its own initiative more than three moths after it had disposed of the underlying case," and that "counsel seeking Rule 11 sanctions must file their motions before entry of final judgment," relying on the Advisory Committee Notes providing "that notice should be given promptly upon the discovery of a rule violation." The same conclusion was reached under the 1993 version of the Rule in *Martin v. Brown*, 63 F.3d 1252, 1262-1263 (3d Cir. 1995).

This Courts holding in *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384 (1990) that "it is well established that a federal court may consider collateral issues after an action is no longer pending," quoted by the Court of Appeals at (App. A, A-1 to A-5) is inapposite. The "collateral issues" this Court referred to at 496 U.S. 395-96 are matters *initiated* during the conduct of the proceedings such as, e.g., award of costs, modification of a decree and criminal contempt. By contrast, the Court of Appeals for the Third Circuit held Rule 11 sanctions entered *sua sponte* by a district court in response to an application for attorney's fees pursuant to 42 U.S.C. § 1988 filed six weeks after the case had been dismissed was not a collateral issue and therefore defective for lack of jurisdiction. *Simmerman v. Corino, supra.* On functionally identical facts the Court of Appeals herein concluded that jurisdiction was not required. *Martin v. Brown, supra.*, invoked the Fifth Amendment in rejecting that conclusion.

*Cooter & Gell* involved an attempt to avoid jurisdiction as to Rule 11 sanctions by filing a notice of dismissal under Rule 41 (a) (1), Federal Rules of Civil Procedure, but it is no authority that the District Court has discretion to ignore either the timeliness directed by the Advisory Committee or the Requirements of Rule 11 (c) (3), for this Court held that

> Although Rule 11 does not establish a deadline for the imposition of sanctions, the Advisory Committee did not contemplate that there would be a lengthy delay prior to their imposition, such as occurred in this case. Rather, "it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation and in the case of motions at the time when the motion is decided or shortly thereafter. 496 U.S. 398 (citation omitted).

Cases cited by the Court of Appeals at App. A holding that a motion should be *decided* at the conclusion of the case are consistent with *Cooter & Gell.* Holding that filing of a motion may also be delayed has the effect of nullifying the protective provisions of the Rule, "safe harbor" and the purpose to induce reasonable remedial action in particular.

## CONCLUSION

Writ of Certiorari should be granted.

In the alternative, this Court should summarily grant certiorari and reverse the orders of the District Court and the Court of Appeals, directing that they conform to Rule 11.

Respectfully submitted,

Parker M. Nielson
*Counsel of Record, pro se*

FILED
7 FEB 1997

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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|---|---|---|
| AUTOMOBILE ASSURANCE FINANCIAL CORPORATION, a Utah corporation; VENUTI AND ASSOCIATES, INC., a Utah corporation; VENUTI PARTNERS, LTD., a Utah limited partnership; FRANK P. VENUTI, an individual, | ) | No. 96-4036<br>(D.C. No. 90-CV-224-S)<br>(D. Utah) |
| Plaintiffs, | ) | |
| PARKER M. NIELSON, | ) | |
| Appellant, | ) | |
| v. | ) | |
| SYRETT CORPORATION, a Delaware corporation, formerly a Utah corporation, | ) | |
| Defendant-Appellee, | ) | |
| JOHN R. RILEY, an individual, | ) | |
| Third-Party Defendant. | ) | |

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## ORDER AND JUDGMENT*

Before PORFILIO, BALDOCK, and HENRY, Circuit Judges

After examining the briefs and appellate record, this pan has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 31.1.9. The case is therefore ordered submitted without oral argument.

Appellant Parker M. Nielson, counsel for plaintiffs and counterclaim defendants, appeals from an order of the district court imposing sanctions on him pursuant to Rule 11 of the Federal Rules of Civil Procedure (1983). The court based the $5,000 sanction on its conclusion that Mr. Nielson had brought and advanced claims and defenses that were not warranted by the facts or law. We affirm.

As counsel for plaintiffs and counterclaim defendants (referred to hereinafter as plaintiffs), Mr. Nielson signed and filed a complaint and two amended complaints against Syrett Corporation (Syrett) alleging that Syrett had violated federal and state securities laws and breached its contract with plaintiffs. Syrett countersued plaintiffs. On the merits, the district court denied all of plaintiff's claims and awarded judgment against plaintiff in Syrett's favor based on plaintiffs' fraudulent actions. Final judgment was entered on June 15, 1994. OnJuly 26, 1994, Syrett filed its motion for sanctions. A hearing on the motion for sanctions was held on March 31, 1995 and on October 4, 1995, the district court issued its memorandum decision ordering sanctions against Mr. Nielson. Mr. Nielson's objections to the decision were denied. Because the conduct for which Mr. Nielson was sanctioned occurred before the 1993 amendments to Rule 11, the district court applied the 1983 version of Rule 11.

Syrett has moved to dismiss the appeal on the ground that Mr. Nielson's notice of appeal was filed late, thus depriving this court of

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

jurisdiction. Our review of the applicable dates reveals that the post-judgment motion tolled the running of the time for filing the notice of appeal, the notice was timely, and this court has jurisdiction over the appeal. See Fed. R. App. P. 4(a) (4); Fed. R. Civ. P. 6(a).

On appeal, Mr. Nielson argues that the district court was without jurisdiction to enter its sanction order. He also maintains the district court erred in: (1) failing to give him the benefit of the safe harbor provision of the 1993 rule; (2) failing to identify the conduct sanctioned; (3) imposing a continuing duty to update previously filed pleadings, not required under the 1983 rule; and (4) sanctioning him for conduct not covered by Rule 11.

Mr. Nielson claims that the district court did not have jurisdiction because the motion for sanctions was filed after final judgment on the merits. "It is well established that a federal court may consider collateral issues after an action is no longer pending." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395 (1990). The district court had jurisdiction over the issue of Rule 11 sanctions after the underlying action was concluded. See id.; Rule 11 (1983) advisory committee's note ("[I]t is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation . . . ."). We also reject Mr. Nielson's laches argument and his claim that it was necessary to serve the parties to the underlying lawsuit with the motion for sanctions in order to invoke the court's Rule 11 jurisdiction over him as the attorney who had filed and tried the case, notwithstanding the fact that he was granted leave to withdraw on September 15, 1993.

Under Rule 11 (1983), the signer of pleading certifies that he has conducted a reasonable inquiry into the factual and legal bases for the filing, and that the substance of the pleading is well grounded in fact and law. Coffey v. Healthtrust, Inc., 955 F. 2d 1388, 1393 (10th Cir 1992). The district court applies an objective standard to determine whether a reasonable, competent attorney would have believed in the merit of the claims made. Dodd Ins. Servs., Inc. v. Royal Ins. Co. of Am., 935 F. 2d 1152, 1155 (10th Cir. 1991). We review the district court's order imposing sanctions under Rule 11 for abuse of discretion, applying that standard to both factual issues and the conclusion that a pleading was not warranted by existing law or a good faith argument to change the law. Id.

The district court rejected Mr. Nielson's claim that he was entitled to the safe harbor provisions of the 1993 rule, which require the party seeking sanctions to notify the offending party and give him or her an opportunity to correct the situation before filing a motion for sanctions. See Rule 11(c)(1)(A)(1993). After the motion for sanctions was filed, Mr. Nielson filed a "'Safe Harbor' Election Pursuant to Rule 11(c)(1)(A)," in which he attempted to withdraw, retract and disavow any and all sanctionable claims or statements. Mr. Nielson's attempt to avoid sanctions by a general, blanket withdrawal, filed well after the damage was done, does not entitle him to the safe harbor.

The remainder of Mr. Nielson's arguments are directed to his position that the district court did not identify any conduct that would subject him to sanctions under Rule 11. The district court's orders clearly stated that Mr. Nielson's clients had acted fraudulently and wrongfully in their dealings with Syrett. Mr. Nielson signed the complaint, the amended complaint, the second amended complaint, and numerous additional documents advancing his clients' claims and defenses based on their fraudulent and wrongful actions. See Coffey, 955 F. 2d at 1394 (signed supplemental pleading is "other paper" contemplated by Rule 11); Mann v. G & G Mfg., Inc., 900 F.2d 953, 961 (6th Cir. 1990) (district court did not abuse its discretion in assessing Rule 11 sanctions where plaintiff's theories of causation were not well-grounded in fact). Accordingly, the district court did not abuse its discretion in concluding that Mr. Nielson had brought and advanced claims and defenses that a competent attorney, after reasonable inquiry, would have determined were not warranted by facts or law.

Mr. Nielson maintains that there was necessarily a sufficient factual basis to satisfy Rule 11 because the district court denied Syrett's motion for summary judgment. The summary judgment proceedings do not direct a result in the Rule 11 context. Here, the district court had ample opportunity during a lengthy bench trial to determine that plaintiffs' claims and defenses were frivolous and merit less, and further, that Mr. Nielson had failed to conduct an adequate inquiry before filing his pleadings to advance those claims and defenses. We conclude that the district court did not abuse its discretion in deciding, based on all the evidence, that Rule 11 sanctions were warranted. See Mann, 900 F.2d at 961 (affirming Rule 11 sanctions even though claims had survived summary judgment).

We have reviewed the entire district court record and we have considered Mr. Nielson's arguments in light of the record. We find no abuse of discretion in the district court's decision to impose sanctions against Mr. Nielson.

The judgment of the United States District Court for the District of Utah is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Bobby R. Baldock
Circuit Judge

FILED
4 OCT 1995

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

AUTOMOBILE ASSURANCE FINANCIAL CORPORATION, et al.,

Plaintiffs,

v.

SYRETT CORPORATION, et al,

Defendant,

Case No. 90-C-0224S

MEMORANDUM DECISION

SYRETT CORPORATION

Counterclaimant and Third Party Plaintiff,

v.

AUTOMOBILE ASSURANCE FINANCIAL CORPORATION, et al.,

Counterclaim Defendants,

and

JOHN R. RILEY, an individual,

Third-Party Defendant.

This matter is before the court on Syrett Corporation's motion for sanctions against Parker M. Nielson, Esq. for misconduct relating, in part, but not exclusively, to numerous papers signed by Mr. Nielson during the pendency of the above-captioned lawsuit. In response to the motion for sanctions Mr. Nielson filed a motion to strike, a motion to quash and a purported "Safe Harbor" election under Fed. R. Civ. P. 11, as amended in 1993. Mr. Nielson did not respond directly to the motion for sanctions. A hearing was held March 31, 1995 at which petitioner was represented by Glen Richman, Esq. and Bart Johnson, Esq. Syrett Corporation was represented by Max Wheeler, Esq. and Stan Preston, Esq. At the conclusion of counsel's presentations the court denied the motion to strike and the motion to quash and took the motion for sanctions and Mr. Nielson's "safe harbor" arguments under advisement. The following is the ruling of the court on the motion for sanctions and Mr. Nielson's purported defense thereto.

I. Status of Rule 11

Rule 11 of the Fed. R. Civ. P. was amended effective December 1, 1993. It has been suggested that the amendment is "applicable to all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." Knipe v. Skinner, 19 F. 3d 72, 78 (2d Cir. 1994).

> Under the amended version, the imposition of sanctions for a Rule 11 violation is discretionary rather than mandatory. In addition, to avoid sanctions, argument for extensions, modifications, or reversals of existing law must now be supported by a "nonfrivolous," rather than "good faith" argument.
>
> Because Rule 11 sanctions should be imposed with caution, [citation omitted], we conclude that a just and practicable application of the amended Rule 11 requires that the district court be afforded an opportunity to exercise its discretion whether to impose sanctions under the amended version.
>
> However, on remand the district court should otherwise adhere to the version of Rule 11 in effect at the time of

> its prior decisions. Any further retroactive application of the amended Rule 11 would charge Smith with knowledge of a rule not in effect at the time of filing and therefore would not advance Rule 11's central goal of deterring baseless filings. [Citation omitted].

Id. The Tenth Circuit has indicated its approval of this procedural approach to application of amended Rule 11 to situations where the conduct occurred under the pre-1993 version of Rule 11 but the motion for sanctions is brought after the effective date of the most recent amendment. See Dilley v. United States, No. 93-4225, slip op. at 3, (10th Cir. Mar. 6, 1995).

Accordingly, the court will apply the substantive provisions of the version of Rule 11 in effect prior to the 1993 amendment; but use its discretion in awarding sanctions, if any, once a violation of the rule is determined. Justice and fairness to all parties, including Mr. Nielson, require that the version of Rule 11 in effect at the time of the conduct complained of be applied by this court in determining the motion for sanctions.[1]

II. Application of "Safe Harbor" Provisions

Amended Rule 11 includes a "safe harbor" provision requiring that before a motion for sanctions is filed with the court, counsel must serve the motion on the offending party at least 21 days before the pleading is filed with the court. The 21 day period is intended to give the alleged offender time and opportunity to correct or withdraw the offensive allegation or contention before the court is involved. In, theory, the timely withdrawal of an offending contention will protect a party against a motion for sanctions and will minimize damage done by pleadings and other papers which are in violation of Rule 11.

In response to Syrett Corporation's motion for sanctions, Mr. Nielson

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[1] Mr. Nielson filed the complaint in this action on March 6, 1990. The court's Findings of Fact and Conclusions of Law were filed June 23, 1993 and the Judgment was signed and enterd by the court on June 15, 1994. True and correct copies of the Findings of Fact and Conclusions of Law and the Judgment are attached hereto and by reference incorporated herein.

filed a "Safe Harbor" Election Pursuant to Rule 11(c) (1) (A) in which he attempted to deny and withdraw all statements made in every objectionable pleading referenced by Syrett Corporation in the motion for sanctions. The court has made its determination that the 1993 amendments to Rule 11 will not be applied to the conduct in question. Furthermore, Mr. Nielson's "Safe Harbor" Election directly contradicts the purposes behind Rule 11. The "safe harbor" provisions of amended Rule 11 are intended to allow counsel to remedy the effects of offending conduct promptly and voluntarily before opposing counsel, parties or the court spend time and money responding to the unmeritorious pleading or motion.

Mr. Nielson's efforts are of no consequence. The damage has been done and Mr. Nielson's attempts to defend the motion for sanctions with half-hearted denials and retractions offend the court and the purposes behind Rule 11. Accordingly, although redundant of the court's initial finding that amended Rule 11 does not apply to the motion before the court, the court finds the "safe harbor" provisions advanced by Mr. Nielson to be inapplicable.

III. Analysis of Motion for Sanctions

Mr. Nielson has not advanced any defense to or explanation of the conduct highlighted in the motion for sanctions. The court is aware of the pattern of conduct engaged in by Mr. Nielson and his client throughout the course of the litigation. As noted in the Findings and Conclusions issued by the court after the bench trial of this matter, Mr. Nielson's pleadings encompassed claims which were frivolous, without factual or legal support, and advanced for an improper purpose.

The court finds that Mr. Nielson had a duty to conduct an inquiry into both the facts and the law before filing his complaint and at each stage of the pleading and motion practice thereafter in which he and his client engaged during the course of the litigation. The standard applied by the court in its review of the conduct in question is one of reasonableness under the circumstances. See Fed. R. Civ. P. 11 advisory committee's note, 1983 amendment. "This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation." Id. See also Dodd Ins. Ser-

vices v. Royal Ins. Co., 935 F.2d 1152, 1155 (10th Cir. 1991); Burkhart Through Meeks v. Kinsley Bank, 804 F.2d 588 (10th Cir. 1986).

Applying a reasonableness standard to Mr. Nielson's conduct necessitates a conclusion that Mr. Nielson violated Rule 11 and sanctions are warranted. A prefiling inquiry into the facts and law applicable to the Syrett Corporation litigation would have revealed serious deficiencies. Even giving Mr. Nielson the benefit of the doubt that perhaps he was relying too heavily on information supplied by his client in the early stages of the case, there were numerous opportunities throughout the course of the lawsuit where reasonable inquiry would have dictated Mr. Nielson abandon unmeritorious claims and defenses due to utter lack of merit. Mr. Nielson's practice of filing spurious motions to which Syrett Corporation had to respond combined with his assertion of groundless positions in opposition to Syrett's claims caused Syrett to unnecessarily incur legal costs, impeded proper discovery, delayed the litigation, appeared improperly motivated and designed to harass.

Accordingly, based on the entire record of the case, including, but not limited to, the pleadings filed in support of the motion for sanctions, the court finds an attorney, upon reasonable inquiry into the facts and law, would have known that many of the claims, defenses, motions and arguments advanced by Mr. Nielson were not warranted by the facts, existing law or a good faith argument for the extension, modification, or reversal of existing law. Sanctions are hereby awarded to Syrett Corporation in the amount of $5,000. This award of sanctions is rendered against Mr. Parker Nielson personally for his conduct as attorney for Mr. Venuti and related entities in the above-captioned suit.

Although the loss incurred by Syrett Corporation in costs and attorneys' fees far exceeds the amount of the sanctions, it is the court's view that the amount imposed is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.

So Ordered.

DATED this 4th day of October, 1995

BY THE COURT:

/S/_____

DAVID SAM

U.S. DISTRICT JUDGE

FILED
11 JAN 1996

APPENDIX C

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

AUTOMOBILE ASSURANCE FINANCIAL CORPORATION, et al.,
Plaintiffs,

v.

SYRETT CORPORATION, et al.,

Appellant,

SYRETT CORPORATION,

Counterclaimant and Third-Party Plaintiff,

v.

AUTOMOBILE ASSURANCE FINANCIAL CORPORATION,et al.,
Counterclaim Defendents,

and

JOHN R. RILEY, an individual,

Third-Party Defendant.

Case No. 90-C-0224S

ORDER

This matter is once again before the court to address the conduct of Parker M. Nielson, Esq. as counsel for Frank Venuti in the above referenced litigation. The court, by Memorandum Decision dated October 4, 1995, previously awarded sanctions to Syrett Corporation pursuant to Rule 11, Fed. R. Civ. P. Mr. Nielson has now filed a motion for entry of order conforming to Rules 11 (c) (3) and 58, and for relief from the October 4, 1995 Memorandum Decision. Pursuant to D. UT. 202 (d), this matter will be determined by the court on the basis of the written memoranda of the parties, and the entire record of the case, without the assistance of oral argument.

Before addressing the specifics of the most recently filed motion, the court notes the Memorandum Decision of October 4, 1995 remains in full force and effect and will not be set aside or amended. The issue of sanctions under Rule 11 and the basis for the court's decision was fully and sufficiently addressed in that Memorandum Decision. The only explanation for the motion for entry of order filed [sic.] Mr. Nielson and his counsel is either total disregard for the court's decision or a serious misunderstanding of the court's position on the arguments asserted.

The court previously held that it would apply the version of Rule 11 in effect prior to the 1993 amendment. Nevertheless, the court determined if a violation of the rule were found, it would exercise its discretion in making an award of sanctions. Tenth circuit authority referenced in support of that holding has been misconstrued by Mr. Nielson and his counsel.[1] Contrary to movant's assertions, the "safe harbor" election does not apply to Syrett's motion. Even if the court were to allow Mr. Nielson's purported "safe harbor" election to stand, his withdrawal of every comment, reference, pleading or allegation made during the course of the litigation is disingenuous and in violation of the letter and spirit of amended Rule 11. The purpose of the "safe harbor" election is to encourage "the timely withdrawal of a contention . . ." See Notes on Advisory Committee on Rules, 1993 Amendment. Not only is Mr. Nielson's purported withdrawal and revocation of each and every thing he did while representing Mr. Venuti in the litigation untimely and offensive, under the circumstances of this case it validates the court's conclusions and findings with respect to the original motion for sanctions and is illustra-

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1. See Dilley v. United States, No. 93-4225, slip op., (10th Cir. Mar. 6, 1995) (not attached because all counsel appear to have a copy of the opinion).

tive of the very type of conduct engaged in by Mr. Nielson throughout the litigation.

Turning to counsel's assertion that the Memorandum Decision is defective because it does not comply with movant's interpretation of Rule 11 (c) (3), the court need not issue a separate "order" under subdivision (c)(3).[1] The court described the sanctionable conduct in its Memorandum Decision dated October 4, 1995 and in the Findings and Fact and Conclusions of Law filed June 23, 1993 (three months before Mr. Nielson withdrew as counsel for Mr. Venuti) and the Judgment entered June 15, 1994, all incorporated by reference into the Memorandum Decision and attached thereto.[3] The Findings and Conclusions detail the conduct of Mr. Venuti and the frivolous, meritless nature of the claims and defenses asserted by him and on his behalf—all of which were advanced by Mr. Nielson's alleged reliance on information given him by Mr. Venuti in the initial stages, Mr. Nielson had the responsibility and duty to investigate and research the claims at each stage of the litigation. It is "[t]he person signing, filing submitting, or advocating a document [that] has nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation." Notes of Advisory Committe on Rules, 1993 Amendment.[4]

This situation has some parallels to the Rule 11 discussion in Mann v. G&G Manufacturing, Inc., 900 F. 2d 953 (6th Cir. 1990) where that court determined that a reasonable pre-filing inquiry would have revealed facts to plaintiffs' counsel sufficent to halt the litigation process. Having determined that the amended complaint was not well-grounded in fact,

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2. Although not by separate order, the court has complied with the directive of Rule 11 (c) (3) by describing the conduct determined to constitute a violation of Rule 11 and explaining the basis for the sanction imposed. There is no requirement in this subsection or elsewhere dictating the type of specificity or itemization movant appears to be demanding.

3. The fact that Mr. Nielson was no longer counsel of record the day the Judgment was filed is irrelevant. The Judgment referenced in the court's October 4, 1995 Memorandum Decision relates to all parties and claims made throughout the course of the litigation. Contrary to movant's assertion, the Judgment does not only describe conduct of Third Party Defendant John R. Riley. Counsel and movant are once again either disregarding the court's statements or seriously misunderstanding them.

4. Although the court is not applying the 1993 amended version of Rule 11, this principle has always been present and controlling in deciding Rule 11 motions.

the court of appeals found the district court had not abused its discretion in imposing Rule 11 sanctions on plaintiffs' counsel. As in this case, counsel in Mann argued that the district court must specify which pleadings or papers violated Rule 11. The Sixth Circuit found this argument unpersuasive. Once an essential factual predicate to plaintiffs' claims was found missing, "the district court stated that Rule 11 'was violated by each attorney who signed *any* pleading or appeared at *any* proceeding on behalf of plaintiffs.'" [citations omitted] Id. at 960 n.6. "A reasonable pre-filing inquiry should have persuaded plaintiffs' counsel that the amended complaint against G&G was not well-grounded in fact. Rule 11 was then continuously violated by the equally unreasonable, but later-filed pleadings of plaintiffs' counsel. [cititaion omitted]" Id.

Futhermore, the court made no error in referring to the moving papers of Syrett Corporation. They contained detailed, accurate statements of Mr. Nielson's conduct. Agreement with a party's position or adoption of the arguments presented is not delegating to counsel the determination of what conduct [is] consider[ed] to be sanctionable." Movant's Memorandum in Support at 4. The court was fully apprised of the nature of Mr. Nielson's conduct and pleadings and made an informed, independent decision that he had failed to make a reasonable inquiry into the law and facts of the case and his conduct warranted sanctions.

The court will address one additional argument advanced by movant—that survival of claims on a motion for summary judgment is somehow a defense to a Rule 11 motion. Movant is wrong. "[A] denial of a motion for summary judgment does not preclude a grant of a motion for sanctions against the prevailing party." Id. At 960.

> [W]e must review the two distinct approaches employed by district courts in the disposition of Rule 56 and Rule 11 motions. Although the litigation schedule rests within the discretion of the district court, the Rule 56 motion is often granted or denied shortly after it is made. *See Donaldson v. Clark*, 819 F.2d 1551, 1554 (11th Cir. 1987). In comparison, the rule 11 motion is generally determined at the end of the proceedings. *See id.* at 1555 (citing Fed. R. Civ. P. 11 Advisory Committee's Note to the 1983 Amendment). When considering a rule 56 motion for summary judgment, the district court views

> the evidence in the light most favorable to the non-moving party. *See, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 89 L. Ed.2d 538 (1986). The district court does not weigh the evidence to "determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 91 L. Ed.2d 202 (1986). In contrast, when evaluating a Rule 11 motion for sanctions, the district court "measure [s]" the conduct of the non-moving party's counsel "by an objective standard of reasonableness under the circumstances." INVST, 815 F2d at 401. The district court then weighs the evidence to determine if counsel's pleadings, motions or papers are wellgrounded in fact or warranted by existing law. *See Westmoreland*, 770 e.2d at 1174. Given the significant differences between these two approaches, it is not surprising that a district court's ruling on a Rule 56 motion for summary judgment need not determine the outcome of the district court's ruling on a Rule 11 motion for sanctions. See *Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006, 1014 (2nd Cir. 1986).

Id. at 960-961. This court concurs with the reasoning and statement of law made by the Sixth Circuit in Mann.

While movant makes additional arguments and reiterates many of those made in prior motions, the court will not address them further. This matter was tried and judgment entered in June 1994. The post-trial briefing has been almost as voluminous as pretrial activity. Many, if not most, of the pleadings filed by movant post-trial have been frivolous and lacking in merit. It is imperative that this matter come to final resolution to avoid further unnecessary litigation costs. The court cautions movant and his counsel that no further redundant or meritless pleadings will be tolerated without additional sanctions being imposed.

Accordingly, the motion for entry of order conforming to Rules 11 (c ) (3) and 58, and for relief from memorandum decision is denied.

So Ordered.

DATED this *10th* day of *January*, *1996*.

BY THE COURT:

/S/

DAVID SAM
U.S. DISTRICT JUDGE

FILED
15 JUNE 1994

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

AUTOMOBILE ASSURANCE FINANCIALCORPORATION, et al.,

Plaintiff,

v.

SYRETT CORPORATION, et al.,

Defendant.

JUDGMENT

Civil No. 90-C-224S

Judge David Sam

SYRETT CORPORATION,

Counterclaimant and Third Party Plaintiff

v.

AUTOMOBILE ASSURANCE FINANCIALCORPORATION, et al.,

Counterclaim Defendants,

and

JOHN R. RILEY, an individual

Third-Party Defendant.

The above-entitled matter came before the Court, the Honorable David Sam presiding, for trial without a jury from January 19, 1993, through February 9, 1993. Plaintiffs and Counterclaim Defendants Automobile Assurance Financial Corporation, Venuti and Associates, Inc., Venuti Partners, Ltd., and Frank P. Venuti (hereinafter collectively referred to as "Plaintiffs/Counterclaim Defendants"), were represented by Parker M. Nielson. Defendant, Counterclaimant and Third Party Plaintiff Syrett Corporation was represented by Max D. Wheeler and Stanley J. Preston. Third Party Defendant John Riley (hereinafter, "Riley") was represented by Robert D. Moore. The Court, having considered the evidence presented at trial and the pre-trial and post-trial briefs submitted by the parties, and being fully advised in the premises, entered Findings of Fact and Conclusions of Law on June 23, 1993, in favor of Syrett Corporation, and against Plaintiffs/ Counterclaim Defendants and Riley.

Consistent with the Court's Findings of Fact and Conclusions of Law, Syrett Corporation provided the Court with an Affidavit, supported by billing statements, setting forth nontaxable costs and attorney's fees. The Court, consistent with its Finding of Fact and Conclusions of Law and its findings with respect to nontaxable costs and attorneys' fees incurred by Syrett Corporation in this matter, and good cause appearing therefore, hereby enters judgment, as follows:

1. Plaintiffs/Counterclaim Defendants' claim under Section 12(1) of the Securities Act of 1933 is hereby dismissed, with prejudice, no cause of action.

2. Plaintiffs/Counterclaim Defendants' claims under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 are dismissed, with prejudice, no cause of action.

3. Plaintiffs/Counterclaim Defendants' claim under Utah Code Ann. §§ 61-1-1, -7, -22 are dimissed, with prejudice, no cause of action.

4. Plaintiffs/Counterclaim Defendants' claim for breach of contract and breach of the duty of good faith and fair dealing is dismissed, with prejudice, no cause of action.

5. Plaintiffs/Counterclaim Defendants' Complaint against Syrett Corporation is dismissed in its entirety, with prejudice, no cause of action.

6. Judgment is entered in favor of Syrett Corporation and against Plaintiffs/Counterclaim Defendants on Syrett Corporation's claims under Sections 10(b) and 15(a)(1) of the Exchange Act, and Rule 10b-5.

7. Judgment is entered in favor of Syrett Corporation and against Plaintiffs/Counterclaim Defendants on Syrett Corporation's claims under Utah Code Ann. §§ 61-1-1, -3(1), and -22.

8. Judgment is entered in favor of Syrett Corporation and against Plaintiffs/Counterclaim Defendants on Syrett Corporation's common law fraud claim.

9. Judgment is entered in favor of Syrett Corporation and against Plaintiffs/Counterclaim Defendants on Syrett Corporation's claim for breach of contract.

10. Judgment is entered in favor of Syrett Corporation and against Riley on Syrett Corporation's claims under Section 10(b) of the Exchange Act and Rule 10b-5.

11. Judgment is entered in favor of Syrett Corporation and against Riley on Syrett Corporation's claims under Utah Code Ann. §§ 61-1-1, -3(1), and -22.

12. Judgment is entered in favor of Syrett Corporation and against Riley on Syrett Corporation's common law fraud claim.

13. Judgment is entered in favor of Syrett Corporation and against Riley on Syrett Corporation's common law breach of fiduciary duty claim.

14. Syrett Corporation is entitled to a return of the 100,000 shares of stock which were issued to Automobile Assurance Financial Corporation, as specific performance under its breach of contract claim, and as the appropriate relief under its claims for breach of federal and state securities laws and fraud.

15. The transfer of said stock to Automobile Assurance Financial Corporation is hereby declared null and void, and the Clerk of the Court is hereby ordered to return to Syrett Corporation the stock certificate representing the 100,000 shares issued to Automobile Assurance Financial Corporation, which certificate has previously been tendered to the Court.

16. Judgment is entered in favor of Syrett Corporation and against Plaintiffs/Counterclaim Defendants and Riley, jointly and separately, in the amount of $43,000.00 in damages, plus $252,670.06, in nontaxable costs and attorneys' fees, for a total of $295,670.06, together with post-judgment interest thereon at the legal rate.

JUDGMENT ENTERED THIS *15th* day of *June*, 1994.
BY THE COURT:
/S/
David Sam
U.S. District Court Judge

APPROVED AS TO FORM:

GIAUQUE, CROCKETT, BENDINGER & PETERSON
/S/
ROBERT D. MOORE
Attorneys for John R. Riley

APPENDIX E

FILED
24 JUNE 1993

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

AUTOMOBILE ASSURANCE FINANCIAL CORPORATION, et al.,

Plaintiff,

v.

SYRETT CORPORATION, et al.,

Defendant.

Case No. 90-C-0224-S

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SYRETT CORPORATION,

Counterclaimant and Third-Party Plaintiff,

v.

AUTOMOBILE ASSURANCE FINANCIAL CORPORATION, et al.,

Counterclaim Defendants,

and

JOHN R. RILEY, an individual,

Third-Party Defendant.

The above entitled matter came before the court for trial without a jury from January 19,1993 through February 9, 1993. Plaintiffs and counterclaim defendants were represented by Parker M. Nielson, Esq.; defendant, counterclaimant and third-party plaintiff was represented by Max D. Wheeler, Esq. and Stanley J. Preston, Esq.; third-party defendant was represented by Robert D. Moore, Esq. Post trial briefing was completed on March 19, 1993. The court having considered the evidence presented at trial, the pretrial and post-trial briefs submitted by the parties, and being fully advised in the premises, enters the following findings of fact and conclusions of law in favor of defendant, counterclaimnat and third party plaintiff Syrett Corporation, and against plaintiffs and counterclaim defendants Automobile Assurance Financial Corporation, et. al., and third-party defendant John R. Riley.

## FINDINGS OF FACT

1. Plaintiffs and counterclaim defendants are Automobile Assurance Financial Corporation ("AAFC"), a Utah corporation; Venuti and Associates, Inc., a Utah corporation; Venuti Partners, Ltd., a limited partnership; and Frank P. Venuti. Frank P. Venuti is a principal in AAFC and Venuti and Associates, Inc. Venuti and Associates, Inc. is the general partner of Venuti Partners, Ltd. All plaintiffs reside in or have offices in Escalante, Garfield County, Utah. Frank P. Venuti and all other plaintiffs are referred to collectively as "Venuti."

2. Frank Venuti has received training in securities and holds a license as an "investment advisor." However, neither Venuti nor his entities is licensed or registered as a broker/dealer or an agent of the issuer as required by federal and state securities laws.

3. Defendant, counterclaimant and third party plaintiff Syrett Corporation is a Delaware corporation with its principal place of business in Garfield County, Utah. Defendant owns and operates Ruby's Inn, a hotel complex located near the entrance to Bryce Canyon National Park in southern Utah. Ruby's Inn was opened IN 1916 by Rueben "Ruby" Syrett and has been owned and operated by the Syrett family since that time. Ruby's Inn was incorporated as a Utah corporation in 1971. In 1988, as part of the events complained of herein, Ruby's Inn was merged into defendant Syrett Corporation. Defendant is referred to herein as "Ruby's Inn."

4. Third party defendant John R. Riley ("Riley") is an individual residing in Salt Lake County, Utah and is licensed to practice law in the state of Utah.

**Stock Offering:**

5. In July 1988, Venuti approached Ruby's Inn with a proposal to raise capital through a stock offering purportedly without risk to Ruby's Inn. Venuti proposed that Ruby's Inn raise money through the sale of class B common stock which would have no voting rights and no guaranteed dividends. Venuti represented that he could raise $10 to 30 million through such an offering, that it would be without risk to Ruby's Inn, that he would pay the necessary expenses related to the offering and that he would get nothing unless a minimum of $10 million was raised. If he raised $10 million, Venuti would receive 100,000 shares of Ruby's Inn class B common stock. The board of directors of Ruby's Inn agreed to the proposal and Venuti proceeded with the offering.

6. On February 28, 1989, Venuti issued a "prospectus" of the stock offering which the parties have referred to as the "confidential memorandum." The confidential memorandum reflected an offering of 3,000,000 shares of class B common stock at $10.00 per share. A minimum of 400,000 shares ($4,000,000) would have to be sold before Ruby's Inn would accept any subscriptions.

7. The stock offered through the confidential memorandum was not registered under either federal or state securities laws.

8. On March 8, 1989, the directors of Ruby's Inn executed a Consent Resolution which authorized the officers of Ruby's Inn to accept Venuti's offer to pay expenses in connection [sic] the offering. Upon acceptance and receipt of the consideration offered, the Consent Resolution authorized the officers to issue 100,000 shares of class B common stock to AAFC.

9. In connection with the offering, Venuti incurred substantial expenses for accountants, attorneys, appraisals, printing and other services. Ultimately Venuti expended over $100,000 in direct out-of-pocket costs related to the offering. As part of Venuti's's promotional activities, he

mailed copies of the confidential memorandum to entities in and outside the state of Utah and made several trips to California. Venuti also caused Syrett Corporation to be incorporated as a Delaware corporation and caused Ruby's Inn to be merged into Syrett Corporation.

10. Venuti was unsuccessful in selling a single share of Ruby's Inn stock and failed to raise any money whatsoever through the offering. Indeed, the offering as structured by Venuti was not viable and completely unmarketable because the class B stock had no voting rights, no redemption or conversion rights and did not guarantee dividends.

11. On May 26, 1989, Fidelity Transfer Company ("Fidelity"), transfer agent for the offering, received a letter from Riley, who identified himself as the attorney for Ruby's Inn, authorizing the transfer of 100,000 shares of Ruby's Inn stock to AAFC. On July 20, 1989, unbeknownst to Ruby's Inn, Fidelity issued 100,000 shares of stock to AAFC.

12. The shares received by AAFC constituted approximately 9% of the total equity ownership of Ruby's Inn, or approximately $1 to 1.5 million.

13. Ruby's Inn became aware of the transfer of stock to AAFC in approximately August, 1989. When confronted with the transfer, Venuti said he would give the stock back if the Syrett's did not think he earned it. Venuti never did return the stock to Ruby's Inn.

14. Venuti's role in the stock offering was more as a promoter than an investor for the following reasons: (1) his financial involvement differed from that of prospective investors in that his stock was not paid for in the same way that other investors would be required to pay for theirs; (2) he was almost exclusively responsible for soliciting sales of the securities; (3) his claimed entitlement to the 100,000 shares of stock was a benefit received from his promotional activities; and (4) he supervised the planning stages of the stock offering and was involved in the preparation of the offering documents.

15. Venuti used the mails and instrumentalities of interstate commerce in connection with the stock offering, ans specifically in connection with his efforts to sell the stock and his obtaining the 100,00 shares

of stock issued to AAFC.

16. Venuti fraudulently obtained the 100,000 shares of stock in Ruby's Inn without the knowledge, Ruby's Inn and in violation of his agreement with Ruby's Inn.

17. Venuti made untrue statements of material facts and omitted to state material facts as follows:

a. he falsely represented that he would receive no stock unless he raised $10 million and that he would bear the risk of the offering;

b. he falsely represented that he would obtain legal counsel for Ruby's Inn to protect its interests in the stock offering;

c. he falsely represented that he would change the name of Syrett Corporation back to Ruby's Inn, and return and domicile of the corporation to Utah if the offering were unsuccessful;

d. he omitted to inform Ruby's Inn that it was his position that the execution of the March 8, 1989, Consent Resolution would give him an unconditional right to the stock; and

e. he omitted to inform Ruby's Inn of the issuance of the stock to AAFC.

18. Venuti acted knowingly in engaging in the foregoing representations and omissions. Venuti either knew them to be false or made them recklessly, knowing he had insufficient knowledge upon which to base such representations and omissions.

19. Venuti made the representations and omissions for the purpose of inducing Ruby's Inn to act thereon and to arrange the issuance of 100,000 shares of stock to AAFC.

20. Ruby's Inn reasonably relied on the representations and omissions of Venuti and in ignorance of their falsity in that Ruby's Inn would never have proceeded with the stock offering absent the representations and omissions made by Venuti.

**Sale of Ruby's Inn:**

21. During the summer of 1989, Nick Brown and a group of investors (the "Brown" group) became interested in purchasing Ruby's Inn for $16 million.

22. On September 5, 1989, Ruby's Inn signed a letter of intent and a letter regarding a preliminary sales agreement which were prepared by Venuti. The letters evidenced Ruby's Inn's willingness to undertake negotiations for the sale, but the final terms would be negotiated and reduced to a written agreement after review and approval by attorneys for Ruby's Inn.

23. Ruby's Inn executed the September 5 letters in reliance on Venuti's representations that upon the sale of Ruby's Inn for $16 million, Ruby's Inn would, among other things: (1) own all the land, the sewer plant and water rights; (2) receive a perpetual net lease on the land, sewer and water, and 2% of gross sales from any business which would result in a $600,000 annual payment; and (3) receive substantial salaries for individual members of the Syrett family if they chose to work.

24. The Brown group never authorized Venuti to make these representations and would not have agreed to the same.

25. Though various drafts of letters of intent passed between defendant and the Brown group during the fall of 1989, no final or binding agreement was reached.

**John R. Riley:**

26. In late fall of 1988, during the time Venuti was developing the stock offering, third party defendant John Riley was retained by the Syretts to do estate planning for family members.

27. From January through March of 1989, Riley met repeatedly with various representatives of Ruby's Inn to obtain their signatures on numerous corporate documents relating to the stock offering. In January 1989, Riley was formally retained by Ruby's Inn to represent the company on various other matters. Riley was paid by Ruby's Inn for this work.

28. Riley identified himself as the attorney for Ruby's Inn in the May 26, 1989 letter to Fidelity wherein he directed Fidelity to issue 100,000 shares of stock to AAFC.

29. Ruby's Inn believed that Riley was representing its interests with respect to the stock offering. However, throughout the period of the offering, Riley was both an officer and director of AAFC, was attorney for AAFC and received a monthly salary from AAFC. At no time did Riley disclose this conflict of interest to Ruby's Inn.

30. As purported counsel for Ruby's Inn, Riley owed fiduciary obligations of undivided loyalty and confidentiality to Ruby's Inn. As part of these obligations, Riley was required to make complete disclosure of all information which might bear upon the quality of his representation.

31. Riley never disclosed to Ruby's Inn his simultaneous representation of Ruby's Inn and AAFC or his own involvement with AAFC. This conflict of interest prevented Riley from protecting the interest of Ruby's Inn in the stock offering. Riley could not give competent legal advice to Ruby's Inn and protect its interest in the offering without adversely impacting the interests of AAFC.

32. Ruby's Inn has been damaged as a result of Riley's breach of his fiduciary duties to Ruby's Inn.

33. In addition, Riley knowingly aided and abetted Venuti in fraudulently obtaining the 100,00 shares of Ruby's Inn stock as follows:

a. Riley obtained the signatures of the Syretts on various documents relating to the offering without explaining the legal significance of the documents.

b. Riley obtained the signatures of the Syretts on the March 8, 1989 Consent Resolution and omitted to tell them that it was his and Venuti's position that the Consent Resolution gave AAFC an unconditional right to 100,000 shares of Ruby's Inn stock.

c. Riley falsely represented to Fidelity that he was the attorney for Ruby's Inn and authorized to instruct Fidelity to transfer the stock to AAFC. Riley further omitted to disclose this letter to Ruby's Inn or get authorization prior to sending the letter.

34. The stock would not have been issued to AAFC without the participation of Riley.

35. Ruby's Inn reasonably relied on the representations and omissions of Riley to its detriment.

## CONCLUSIONS OF LAW

1. This court has jurisdiction over this action and venue is properly laid in this court.

**VENUTI'S CLAIMS AGAINST RUBY'S INN:**

A. Section 12(1) of the Securities Act:

2. Venuti has failed to prove his Section 12(1) claim against Ruby's Inn by a preponderance of the evidence.

3. Venuti's Section 12(1) claim is defeated by the in pair delicto defense because Venuti's role in the stock offering was more as a promoter than an investor and because Venuti is at least equally responsible for the actions that rendered the transfer of shares illegal.

B. Federal and State Securities Claims:

4. Venuti has failed to prove his claims against Ruby's Inn under Section 10(b) of the Exchange Act, Rule 10b-5 and Sections 61-1-1, 61-1-7 and 61-1-22, Utah Code Ann. It was Venuti rather than Ruby's Inn

who made fraudulent misrepresentations and omissions regarding the offering and the obtaining of the 100,000 shares of stock.

5. Because Venuti obtained the stock in violation of federal and state securities laws, and because the agreement by which he claims a right to the stock is void under Section 29(b) of the Exchange Act, Venuti has no right to maintain any action for the stock under Utah securities law, § 61-1-22(8) or under federal securities law.

C. Breach of Contract Claim:

6. Venuti has failed to prove his claim of breach of duty of good faith and fair dealing against Ruby's Inn by a preponderance of the evidence. No final or binding agreement was ever reached between Ruby's Inn and the Brown group for the sale of Ruby's Inn.

**CLAIMS OF RUBY'S INN AGAINST VENUTI**

A. Federal and State Securities Claims:

7. Venuti used the mails and instrumentalities of interstate commerce in conjunction with the stock offering, made untrue statements of materials facts and omitted to state material facts regarding the stock offering.

8. In obtaining the stock, Venuti employed a device, scheme or artifice to defraud Ruby's Inn and engaged in actions and a course of business which operated as a fraud or deceit upon Ruby's Inn.

9. The facts of this case establish by a preponderance of the evidence the elements necessary to prevail on a claim under Section 10(b) of the Exchange Act and Rule 10b-5, and Ruby's Inn is entitled to recover on this claim.

10. The facts of this case establish by a preponderance of the evidence the elements necessary to prevail on a claim under Section 61-1-1, Utah Code Ann., and Ruby's Inn is entitled to recover on this claim.

11. Venuti was required to be registered as a broker under Section 15(a)(1) of the Securities Exchange Act of 1934 (the "Exchange Act"), inasmuch as he induced or attempted to induce the purchase or sale of

securities, he used the mails and means or instrumentalities of interstate commerce, and he was engaged in the business of effecting transactions in securities for the accounts of others. Venuti has violated Section 15(a)(1) of the Exchange Act by failing to register as a broker.

12. Rule 3a4-1 and the principles articulated under its adopting Release (Exchange Act Release No. 22172, dated June 27, 1985) requires Venuti to be registered as a broker. The safe harbor created by rule 3a4-1 is unavailable to Venuti because (1) Venuti does not satisfy the requirements of this rule; (2) he was an independent agent retained by the issuer specifically for the purpose of selling securities; (3) he supervised and handled all arrangements of the offering (including the preparation of the disclosure documents and solicitation of potential investors); and (4) he received transaction-based compensation. Venuti violated Rule 3a4-1 by failing to register as a broker.

13. Venuti was required to be registered as a broker under Utah Code Ann. § 61-1-3(1), inasmuch as he transacted business in the state of Utah as a broker in relationship to the stock offering.

14. Venuti was also required to register as an agent under Utah Code Ann. § 61-1-3(1), inasmuch as he represented Ruby's Inn in effecting or attempting to effect purchases or sales of securities in Ruby's Inn, and he received compensation or other remuneration, directly or indirectly, for effecting or attempting to effect purchases or sales of these securities. Venuti has violated Utah Code Ann. § 61-1-3(1) by failing to register as either a broker or agent.

15. In light of Venuti's violation of Section 61-1-3(1), Venuti is liable to Ruby's Inn under Section 61-1-22, Utah Code Ann.

16. Venuti received transaction-based compensation inasmuch as Venuti arranged to have issued to AAFC securities of Ruby's Inn, the value of which ($1 to 1.5 million) far exceeded the actual out-of-pocket expenses ($100,000 to $150,000) paid by Venuti in connection with the stock offering. As a result, Venuti indirectly received remuneration based on transactions in securities.

17. Applicable industry standards and NASD guidelines limit com-

missions and compensation to a stated percentage of the amount raised in the offering. Where the stock offering in this case raised zero money, no compensation is allowed or considered reasonable. Accordingly, the 100,000 shares of stock issued to AAFC constitutes excessive compensation, is unreasonable, and violates applicable industry standards. As a result, Venuti has no right to the stock.

B. Common Law Fraud Claim:

18. Venuti made material misrepresentations and omitted to disclose material facts to Ruby's Inn which were false or which he made recklessly, knowing he had insufficient knowledge upon which to base such representations and omissions; Venuti made these representations and omissions for the purpose of inducing Ruby's Inn to act thereon; Ruby's Inn acted reasonably and in ignorance of the falsity of the representations and omissions, and did in fact rely on them and was induced to act to its injury and detriment.

19. The facts of the case establish by a preponderance of the evidence each of the elements necessary to recover on a claim for fraud and Ruby's Inn is entitled to recover against Venuti on this claim.

C. Breach of Contract:

20. Ruby's Inn and Venuti entered into an oral agreement, which was supported by adequate consideration, for Venuti to undertake the promotion of the stock offering. Venuti breached this agreement by arranging to have the 100,000 shares of stock issued to AAFC despite the failure of the stock offering.

21. The facts of the case establish by a preponderance of the evidence each of the elements necessary to recover on a claim for breach of contract and Ruby's Inn is entitled to recover on this claim.

**CLAIMS OF RUBY'S INN AGAINST JOHN RILEY**

A. Federal and State Securities Laws:

22. The court finds in favor of Ruby's Inn on its claim against Riley for violation of Section 61-1-22, Utah Code Ann. which imposes liabil-

ity on any person who violates Section 61-1-(3)1, inasmuch as Riley aided and abetted Venuti in fraudulently obtaining the 100,000 shares of stock.

23. The court finds in favor of Ruby's Inn on its claim against Riley for violations of Section 10(b) of the Exchange Act and Rule 10b-5, inasmuch as Riley aided and abetted Venuti in fraudulently obtaining the stock.

24. The court finds in favor of Ruby's Inn on its claim against Riley for violations of Section 61-1-1-, Utah Code Ann., inasmuch as Riley aided and abetted Venuti in fraudulently obtaining the stock.

B. Common Law Fraud:

25. Riley made material misrepresentations and omitted to disclose material facts to Ruby's Inn which were false or which he made recklessly, knowing he had insufficient knowledge upon which to base such representations and omissions; Riley made these representations and omissions for the purpose of inducing Ruby's Inn to act thereon; Ruby's Inn acted reasonably an in ignorance of the falsity of the representations and omissions, and did in fact rely on them and was induced to act to its injury and detriment.

26. The facts of the case establish by a preponderance of the evidence each of the elements necessary to recover on a claim for fraud and Ruby's Inn is entitled to recover against Venuti on this claim.

C. Breach of Fiduciary Duty:

27. Riley breached his fiduciary obligations owed to Ruby's Inn as its purported counsel by failing to disclose his conflict of interest between Ruby's Inn and AAFC.

28. Ruby's Inn is entitled to recover against Riley on its claim for breach of fiduciary duty, and the facts of the case establish by a preponderance of the evidence each of the elements necessary for Ruby's Inn to recover on this claim.

## DAMAGES TO WHICH RUBY'S INN IS ENTITLED

29. Ruby's Inn is entitled to a return of the 100,000 shares of stock which were issued to AAFC, as specific performance under its breach of contract claim, and as the appropriate relief under its claims for violations of federal and state securities laws and fraud.

30. The transfer of said stock to AAFC is declared null and void, and the clerk of the court is hereby ordered to return to Ruby's Inn the stock certificate representing the 100,000 shares issued to AAFC, which certificate has previously been tendered to the court.

31. Ruby's Inn is entitled to recover as damages from Venuti and Riley, jointly and severally, the amount it has expended in Delaware franchise taxes, which amount $6,000 for each of the years 1989, 1990 and 1991, and $25,000 which is due for 1992, for a total of $43,000.

32. Ruby's Inn is entitled to recover from Venuti its reasonable attorneys' fees and costs expended in pursing and defending this litigation (a) under Utah Code Ann. § 78-27-56, inasmuch as Venuti's claims against Ruby's Inn, as well as his defenses to Ruby's Inn's claims, are without merit and not brought or asserted in good faith; and (b) inasmuch as the fees and costs arising out of this litigation are foreseeable consequential damages for Venuti's breach of contract.

33. Ruby's Inn is entitled to recover from Riley its attorney's fees and costs expended in this litigation, inasmuch as this litigation is the natural and probable consequence of Riley's wrongful acts and breaches of his fiduciary duties to Ruby's Inn. Said attorney's fees and costs are an appropriate measure of damages for Riley's breach of fiduciary duties.

34. Ruby's Inn is entitled to recover from Venuti and Riley, jointly and severally, its attorney's fees and costs expended in defending and pursuing this litigation under Utah Code Ann. § 61-1-22(2), together with interest at the rate of 12% per annum.

35. With respect to costs and attorney's fees, Ruby's Inn shall prove the actual amount of the same by submitting affidavits supported by bill-

ing statements, subject to Venuti's and Riley's right to examine the same. Based on the evidence submitted the court will make a determination as to the amount of attorney's fees and costs to be awarded to Ruby's Inn.

36. The court finds that the acts and omissions of Venuti and Riley are the result of wilful and malicious or intentionally fraudulent conduct, or conduct which manifests a knowing reckless indifference toward and a disregard of the rights of Ruby's Inn. However, the court further finds that there is insufficient evidence on the relative worth of Venuti and Riley to provide a basis upon which the court can reach a reasoned conclusion to make an award for punitive damages. Accordingly no punitive damages are awarded. See, Bundy v. Century Equipment Co., Inc., 692 P.2d 754 (Utah 1984).

SO ORDERED.

DATED THIS 23rd day of June, 1993
BY THE COURT:
/S/
DAVID SAM
U.S. DISTRICT JUDGE

FILED
11 MAR 1997

## APPENDIX F

FOR THE TENTH CIRCUIT

| | | |
|---|---|---|
| AUTOMOBILE ASSURANCE FINANCIAL CORPORATION, a Utah corporation; VENUTI AND ASSOCIATES, INC., a Utah corporation; VENUTI PARTNERS, LTD., a limited partnership; FRANK P. VENUTI, an individual | ) | ORDER |
| Plaintiffs, | ) | |
| PARKER M. NIELSON, | ) | |
| Appellant, | ) | No. 96--4036 |
| v. | ) | |
| SYRETT CORPORATION, a Delaware corporation, formerly a Utah corporation, | ) | |
| Defendant-Appellee, | ) | |
| JOHN R. RILEY, an individual, Third-Party Defendant. | ) | |

Before **PORFILIO, BALDOCK and HENRY**, Circuit Judges.

Appellant, Parker Nielson's petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court
PATRICK FISHER, Clerk of Court
by: /S/
Deputy Clerk